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No. 85-1755

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAMES E. LEBER, PETITIONER

v.

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES AND UNITED STATES DEPARTMENT OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES DEPARTMENT OF THE INTERIOR IN OPPOSITION

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Petitioner contends that a state is a "person" for purposes of Section 703 of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. 1293, which affords protection to "whistleblowing" employees, and that the exclusive jurisdiction of the United States District Court for the District of Columbia to review regulations under that Act precludes all other courts from construing such regulations.

1. Petitioner was an employee of the Pennsylvania Department of Environmental Resources (DER). He alleges that the DER retaliated against him and eventually fired him for reporting to federal officials violations of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (& Supp. II) 1201-1328. His allegations have been the subject of litigation in this proceeding and five others (Pet. App. A4-A5 n.2, 780 F.2d 372, 373-374 n.2). The

Pennsylvania Civil Service Commission and Pennsylvania Human Relations Commission have rejected his complaints on the merits (*ibid.*).

In this case, petitioner sought to invoke the jurisdiction of the United States Department of the Interior under Section 703 of SMCRA, 30 U.S.C. 1293, which provides (30 U.S.C. 1293(a)) that "[n]o person" shall discharge or discriminate against an employee because the employee has instituted proceedings under the Act or testified in enforcement proceedings. Petitioner conceded that the Commonwealth of Pennsylvania was not a "person" under the Act (Pet. App. A7). Petitioner asserted, however, that the Department of the Interior, in 30 C.F.R. 700.5, had expanded the definition of "person" under Section 703 to include a governmental entity.

An administrative law judge agreed with petitioner and denied a motion to dismiss, but the Interior Board of Land Appeals (IBLA) reversed (Pet. App. A40-A52, 80 I.B.L.A. 200, modified, Pet. App. A53-A78, 88 I.B.L.A. 224). The IBLA observed that 30 C.F.R. 700.5 was intended to expand the definition of "person" for limited purposes, but that "[t]here is no indication that the Department intended to create a new forum whereby state employees could seek review of actions taken by the state with regard to state employment practices" (Pet. App. A50). The district court denied a petition for review (*id.* at A18-A35).

The court of appeals affirmed (Pet. App. A1-A17). It rejected petitioner's argument that the DER was seeking to invalidate 30 C.F.R. 700.5 and therefore must proceed in the United States District Court for the District of Columbia: "DER does not challenge the regulation's legality, but only Leber's interpretation of it. That issue is properly before us" (Pet. App. A11). The court of appeals also

rejected petitioner's interpretation of the regulation, holding that the Department's contemporaneous explanation of the regulation, as well as the deference normally accorded an agency's interpretation of its own regulations, supported IBLA's holding (Pet. App. A12-A15).

2. Petitioner, citing cases concerning Congress's power under the Commerce Clause and its intent in enacting other statutes, contends that the SMCRA itself should be construed to treat states as "persons" under Section 703 (Pet. 13-14). Petitioner made no such argument in the court of appeals. Instead, he conceded that the statute could not be so construed (Pet. App. A7). He may not invoke the argument for the first time in this Court.* In any event, the opinion of the court of appeals, on which we rely, correctly holds that the omission of "state" and "state agency" from the statutory definition of "person" (30 U.S.C. 1291(19)) demonstrates that Congress did not intend for states to be treated as "persons" under Section 703 (Pet. App. A11).

It is not clear whether petitioner urges this Court to grant certiorari to review the construction of 30 C.F.R. 700.5 by the IBLA and the court of appeals. But he has offered no reason to depart from the settled principle that, "[i]n construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977) (quoting *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414 (1945)). Section 700.5 includes states and state agencies in the definition of "person" in order to permit

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*Petitioner (Pet. 18) urges the Court to vacate and remand for consideration in light of *Garcia* v. *San Antonio Metropolitan Transit Authority*, No. 82-1913 (Feb. 19, 1985). Yet petitioner's brief in the court of appeals, filed May 31, 1985, makes no mention of *Garcia*, decided more than three months earlier, or of the constitutional principles discussed in *Garcia*.

their involvement "in actions taken by the regulatory authority under State programs, particularly actions relating to permits and designations" (44 Fed. Reg. 14912 (1979)), such as proceedings described in 30 C.F.R. 764.13. It also includes states and state agencies "because under Section 524 of the Act [30 U.S.C. 1274], they are subject to regulation when engaged in surface coal mining and reclamation operations and because such agencies have definite interests in actions taken under the Act" (44 Fed. Reg. 14912 (1979)). These purposes have nothing to do with providing a federal forum for a state employee who may litigate (in petitioner's case, has litigated) his allegations before state agencies. Indeed, the Department of the Interior specifically observed when it promulgated the regulation defining "person" that it "d[id] not intend by this to expand upon an agency's capacity to * * * be sued" (*ibid.*). The construction of 30 C.F.R. 700.5 by the court of appeals was correct.

3. Petitioner argues (Pet. 15) that the court of appeals erred by "invalidat[ing]" 30 C.F.R. 700.5, since only the United States District Court for the District of Columbia has jurisdiction to review "national rules or regulations" promulgated under SMCRA (30 U.S.C. 1276(a)(1)). But the court of appeals did not invalidate 30 C.F.R. 700.5. It specifically avoided issues relating to the power of the agency to promulgate regulations (Pet. App. A12) and instead merely construed the regulation in determining the issues that were properly before it.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1986